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IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF ALABAMA,

PETITIONER,

V.

SYLVESTER BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT AND COURT
OF CRIMINAL APPEALS OF ALABAMA

# PETITION OF THE STATE OF ALABAMA

OF

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## QUESTIONS PRESENTED

A. Where a warrant magistrate finds probable cause to believe that persons present at a criminal operation are in possession of evidence, contraband or weapons, does the Fourth Amendment forbid the issuance of a search warrant for such persons, where they cannot be identified at the time the warrant is issued?

B. Did this Honorable Court in Ybarra v. Illinois, (444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338 [1979]), adopt a per se rule forbidding the issuance of search warrants for persons who cannot be identified or described, except by their presence in a defined building?

## THE PARTIES

In the Circuit Court of Lee County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Sylvester Brooks who is Respondent herein, as Defendant, Appellant and Respondent, respectively, and the State of Alabama, who is Petitioner herein, as Plaintiff, Appellee, and Petitioner, respectively.

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PETITION OF THE STATE OF ALABAMA

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The State of Alabama, Your Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and orders of the Supreme Court and Court of Criminal Appeals of Alabama in the above cause.

## OPINIONS AND ORDERS BELOW

The Order of the Circuit Court of Lee County, Alabama, overruling the Respondent's motion to suppress is not reported and is

submitted as Appendix "A" to this petition.

The opinion and order of the Court of Criminal Appeals of Alabama reversing the Respondent's conviction is reported as follows:

Brooks v. State, 593 So.2d 97

(Ala. Cr. App, 1991)

A copy of the same is submitted in Appendix "B" hereto.

The order of the Court of Criminal Appeals of Alabama denying rehearing is reported as part of the report of the Court's opinion, as set out above.

A copy of the same is submitted in Appendix "B" hereto.

The order of the Supreme Court of Alabama denying certiorari review is reported as part of the report of the Court of Criminal Appeals' opinion.

A copy of the same is submitted as Appendix "C" hereto.

## JURISDICTION

The order of the Supreme Court of Alabama denying review was issued on February 7, 1992, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Supreme Court and Court of Criminal Appeals of Alabama, believed that their decisions were mandated by the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is making a claim under the same said provisions. Said constitutional provisions read:

"AMENDMENT IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"AMENDMENT XIV

"Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATUTORY PROVISIONS INVOLVED

No statutory provisions are at issue in this proceeding. The Respondent was indicted and convicted under Section 13A-12-231,(2)(a) Code of Alabama, 1975, and the warrant was issued pursuant to Sections 15-5-1-5 of the same Code. Copies of these

statutes are submitted in Appendix "D" hereto.

## STATEMENT OF THE CASE

In this case the Court of Criminal Appeals of Alabama ruled that a warrant magistrate could not, under the United States Constitution as interpreted by this Honorable Court in Ybarra v. Illinois (444 U.S. 85, 62 L.Ed.2d 238, 100 S. Ct. 338 [1979]), issue a search warrant commanding the search of persons present at a criminal operation, where such persons cannot be otherwise described. In reaching this conclusion, the Court of Criminal Appeals followed, quoted from and extended its decision in Helms v. State (549 So. 2d 598 [Ala.Cr.App, 1989]; cert. den; U.S. cert. den. 493 U.S. 1022, 107 L.Ed.2d 744, 110 S. Ct. 725 [1990])

In Helms a magistrate issued a search warrant for a certain apartment, "...and the persons, if you find the same present...."

(Helms 548 So. 2d 598, 600) Although the apartment was not rented by Helms, he was an occupant of the apartment and was present at the time of the search, and he was searched under the warrant. The Court of Criminal Appeals ruled that the warrant was valid as to the apartment (Helms 549 So. 2d 598, 599) but invalid as to Helms under Ybarra v. Illinois, above. The Court wrote:

> "...The search warrant issued in the instant case reads as follows:...
>
> "...'You are hereby commanded to search forthwith the residence above described for the property and the persons, if you find the same present...'...
>
> "As can be seen from the above, the search warrant contains no descriptions or names of any persons to be searched. The leading case on this issue is Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338, 62 L.Ed.2d 238 (1979). In Ybarra, the United States Supreme Court held that the Fourth and Fourteenth Amendments will not be construed to permit evidence searches of persons who, at the commencement of the search, are on 'compact' premises subject to a search

warrant, but are not named or described in the warrant, even where the police have a 'reasonable belief' that such persons 'are connected with' drug trafficking and 'may be concealing or carrying away the contraband.' 444 U.S. at 94, 100 S. Ct. at 344. This court, as well as all other courts in this land, is obliged to follow this decision.

"Alabama courts, in following the dictates of Ybarra, have held that a warrant to search designated premises will not authorize the search of every individual who happens to be on the premises...[citations and examples omitted]...

"The warrant issued in the instant case authorized the search of 'the residence above described for the property and the persons.' Based upon Ybarra and the aforementioned Alabama cases, the wording 'and the persons' contained in the warrant was too broad to justify the search of appellant's person since no persons were named or described in the warrant...." (549 So.2d 598, 600-601; emphasis supplied)

And:

"...Because of the controlling authority of the United States Supreme Court case of Ybarra v. Illinois, supra, we reluctantly

> hold that the strip search of appellant was not justified under the search warrant as written, or pursuant to any of the exceptions to the warrant requirement. Accordingly, the cocaine taken from him was due to be suppressed...." (Helms 549 So.2d 598, 601; emphasis supplied)

In the instant case, the Respondent, Sylvester Brooks was indicted for trafficking in cocaine.[1], (R.pp 603-604)

Prior to trial, the Appellant moved to suppress the evidence found on his person pursuant to a search warrant. (R.P. 612) Evidence on the same was heard before trial (R.pp. 4-269), and the motion was overruled by an order which read:

> "...[T]he Court finds that the search in this case was not unreasonable. Neither were the seizures. That the warrant in this case was issued on probable cause, that it was supported by oath or affirmation, and it particularly described the place to be searched and the persons or things to be seized.

---

1. Section 13A-12-231(2) Code of Alabama, 1975; appendix D.

"And, therefore, the order and judgment of the Court that the warrant in this case, that is the search warrant, is proper, and I so find.

"I also find that the search itself and the matters seized were done pursuant to law and in accordance with the Constitution of the State of Alabama and of the Federal Constitution.

"Accordingly, your motions, each of the defendant's motions to suppress is denied. The results of the search, the Court finds, are admissible."(R. pp. 267-268; Appendix "A")

After a mistrial (R.pp 599-600) the cause came on for trial on May 24, 1989. The Respondent was convicted and sentenced to life imprisonment and a $50,000.00 fine, as authorized by Section 13A-12-231(2)(a), Code of Alabama, 1975; Appendix D. (R.p. 1, 600-601)

Appeal followed.

On July 27, 1991, the Court of Criminal Appeals of Alabama reversed the Respondent's conviction. Brooks v. State

593 So.2d 97 (Ala. Cr. App, 1991); appendix "B"). As far as is relevant to the issue raised by this petition, the Court ruled that the warrant was valid as to the place and one person who could be identified and who was named in the warrant. Brooks, note 1, 593 So.2d 97, 98; Appendix "B", page 4) The Court stated and relied on the fact that the affiant,"...officer acknowledged at the suppression hearing that, when obtaining the warrant, he had no knowledge that anyone else was expected to be in the restaurant and that he did not know that the ...[Respondent] would be present...." Brooks 593 So.2d 97, 98; Appendix "B", page 8) The Court then went on to hold that the warrant was void as to the Respondent, because he was not and could not have been, named or particularly described in the warrant. In reaching this conclusion, the Court of Appeals relied on Helms v. State, above, and quoted much of

the language from Helms, which we set out at pages 6-8 above, including the language: "...[T]he leading case on this issue is Ybarra v. Illinois...." and "...Alabama Courts, in following the dictates of Ybarra...." (Brooks 593 So.2d 97, 99; Appendix "B", pages 8-10) The Court of Appeals even concluded that the warrant in this case was so bad as to the Respondent that the executing officers' reliance on it in good faith could not protect the evidence from exclusion.[2]

Your Petitioner applied for rehearing arguing, as it had on original submission:

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2. See United States v. Leon 468 U.S. 897, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984); Massachusetts v. Sheppard 468 U.S. 981, 82 L.Ed.2d 737, 104 S.Ct. 3424 (1984) and Walker v. State 462 So.2d 794, 795 (Ala.Cr.App, 1984); cert. den, all cited by the State on original submission in the Court of Appeals.

1. A warrant directing the search of persons present at a criminal operation is valid.

2. The officers were justified in relying on the warrant in good faith.

3. Even if the warrant was void, the magistrate's finding of probable cause as to the place, coupled with what the officers found when they went to execute the warrant, justified the search of the Respondent.

On September 20, 1991,the application for rehearing was denied without opinion. (Appendix "B", pages 14-15)

Your Petitioner sought review in the Alabama Supreme Court raising the same issues which it had raised on original submission and on rehearing in the Court of Appeals. On February 7, 1992, the State's petition was denied. (Appendix "C")

The instant petition is filed in this Honorable Court raising only the first

issue raised in the state courts, the validity of a "persons present" warrant.

## STATEMENT OF THE FACTS

The facts relating to the search of the Respondent's person and seizure of cocaine from him are as follows:

For about two weeks prior to October 7, 1988, Detective Melvin Harrison had kept John & Bo's Fish Supreme in Opelika, Alabama, under surveillance. This was a carry out restaurant type of establishment, with large areas of windows through which a number of individuals kept watch on the various approaches to the building. Sales were made through a service window; the building itself was not open to the public. (R. p. 66-72)

On October 7, 1988, Detective Harrison met with an undercover informant. The Detective searched the informer to be sure that he had no drugs or money on his

person. The informer, who was equipped with a body transmitter, then went to the service window of the establishment and purchased cocaine with marked money. Detective Harrison was able to hear and see the transaction through the transmitter and a telescope. Harrison was also able to observe and monitor another cocaine sale which was made contemporaneously with but independently of the controlled buy. (R. pp. 73-75 and 130-131)

Detective Harrison then executed a search warrant affidavit, which read:

> "[I]n Lee County, State of Alabama there is now being concealed certain property, namely cocaine hydrochloride, a Schedule II drug under the Alabama Uniform Controlled Substances Act, and United States Currency which are now being stored, concealed, otherwise hidden at 600 South Fourth Street Opelika, Alabama, presently known as JOHN & BO's FISH SUPREME.
>
> "(here give alleged grounds for search and seizure)

"And that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: a confidential informant in the past forty eight hours has purchased cocaine from a black male known as Mike Perry at JOHN & BO's FISH SUPREME, 600 South Fourth Street in Opelika, Alabama. The money used in the purchase was copied and the serial numbers recorded. The purchase was also monitored and observed by Det. Harrison. The confidential informant used has been proven to be reliable and in the past has aided in the arrest of several persons. JOHN & BO's FISH SUPREME business license is also under the name of Michael Perry. Det. Harrison checked with the Opelika Light and Power and found that the power at JOHN AND BO's FISH SUPREME is issued to Michael Perry. ..."(R. p. 644)

The affidavit was presented to a judge of the District Court of Lee County. The District Judge placed the Detective under oath and examined him about the matters set out in the affidavit. Detective Harrison also advised the District Judge of the cocaine purchase which had occurred at the

time of but independently of the controlled buy. (R. p. 130-133)

The District Judge issued the warrant, which read:

"SEARCH WARRANT

"The State of Alabama, County of Lee, City of Opelika

"To any Sheriff, Deputy and/or Municipal Police:

"Proof by affidavit having been made this day before me, by Detective Melvin Harrison of the Opelika Police Department. You are hereby commanded to make immediate search on the person and premises of Michael Perry, alias, and the business at 600 South Fourth Street Opelika, Alabama known as JOHN AND BO's FISH SUPREME, and any other persons therein, and any vehicles on the premise for the following property [:] cocaine hydrochloride or any other controlled substance and United States Currency and if you find the same or any part thereof, to bring it forthwith before me, at my office at Opelika, Lee County, Alabama.

"Dated the 7 day of October 1988. (R.pp. 51-61, 129-132 and 646; emphasis supplied.)

Since Detective Harrison had observed persons inside the establishment keeping

watch, the building was not open to the public and was secured with steel doors and locks, and Harrison had received information that any appearance of the police would result in the drugs being destroyed, he enlisted the aide of the Opelika Fire Department in gaining entry. (R. pp. 66-72 and 127-129)

Inspector Meadows of the Opelika Fire Department was admitted to the locked building to inspect the sprinkler system. He opened the door, whereupon, the officers with the warrant announced their purpose and authority and entered the building. (R. pp. 69-70)

The Respondent was found inside the establishment and cocaine and marked money were found on the Respondent's person. (R. pp. 65 and 111-112)

## SUMMARY OF THE ARGUMENT

There was in this case clear probable cause to search those present, and the Alabama appellate courts recognized this as to a person whose identity was known at the time the warrant was issued. Unless the Alabama courts are correct in ruling that this Court in Ybarra v. Illinois, (444 U.S.85, 62 L.Ed.2d 238, 100 S. Ct. 338 [1979]), established a per se rule barring the issuance of warrants to search persons who can be identified only by their presence at a criminal operation, then there is no basis in law for the decision of the state appellate courts in this case.

A. This case presents an important question not previously addressed by this Honorable Court. This Court in Ybarra, above, stated that it did not need to consider this question. Ybarra v. Illinois, note 4, 444 U.S. 85, 92, 62

L.Ed.2d 238, 246. This case clearly presents the question.

B. The appellate courts of Colorado, Florida, Massachusetts, Minnesota, New Jersey, Oregon and Wisconsin have, since the decision in Ybarra, resolved the issue of this case in conflict with the decision reached by the Alabama appellate courts. In addition, the Courts of Colorado, Minnesota and Wisconsin have expressly rejected arguments that Ybarra forbids warrants for persons present at criminal operations, who cannot otherwise be identified.

C. By placing unidentifiable persons, who are present at criminal operations which are ordered searched, beyond the warrant process, the Alabama appellate courts ruled contrary to the Fourth Amendment's policy which prefers searches pursuant to search warrants.

## ARGUMENT

This case presents the common situation where an ongoing criminal enterprise is found occupying a building. It is undisputed in this case that the magistrate was authorized to order the search of the building. But, may the search of persons in the building be authorized? As the Supreme Court of South Carolina stated in State v. Ferrell (266 S.E. 2d 869, [S.C, 1980]):

> It is unreasonable to infer that anyone other than a participant would be present. In such a persuasive setting probable cause existed to search all present. U.S. v. Johnson, 475 F.2d 977, 980 (1973); State v. DeSimone, 60 N.J. 19, 288 A.2d 849 (1972)...." (266 S.E.2d 869, 872)

The Alabama appellate courts would agree, and they upheld the search of Michael Perry's person under the warrant, because Perry was named in the warrant and was

present in the building. However, because Detective Harrison could not predict, identify and name or describe others who would be present when the warrant was executed, the warrant was held to be void as to those described only as, "...other persons therein...." The issue is: Is such a description sufficient for the purposes of a search warrant?

The purpose of naming or describing the persons, places and things to be searched in a warrant is to insure that only those as to whom or which probable cause has been found are searched. Lo-Ji Sales Inc. v. New York 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2319 (1979). Obviously, officers executing this warrant would be able to ascertain who was intended by "...other persons therein...." See Steele v. United States 267 U.S. 498, 503, 69 L.Ed. 757, 760, 45 S.Ct. 414 (1925). The persons therein, i.e. inside the sealed

building out of which the criminal enterprise as being operated, were the very persons as to whom probable cause was found by the magistrate. Therefore, unless the Alabama appellate courts are correct in holding that this Honorable Court's decision in Ybarra v. Illinois, (444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338 [1979]), established a per se rule forbidding magistrates to issue warrants for the search of unidentified persons present at a place ordered searched, the decision of these courts has no basis in law.

**A.**

**REASON FOR GRANTING THE WRIT: AN IMPORTANT NOVEL QUESTION**

In Ybarra v. Illinois, (444 U.S. 85, 62 L.Ed.2d 238, 100 S.Ct. 338 [1979]), this Court rejected a state statute, which allowed a "pat down" of all persons present at a place ordered searched by a search warrant, even if the place was open to the

public and there was no reason to suspect such persons of criminal activity. Ybarra, note 1, 444 U.S. 85, 87, 62 L.Ed.2d 238, 243. Compare Brown v. Texas 443 U.S. 47, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979). In Ybarra the warrant magistrate had ordered the search of a public tavern and a named bartender only; the warrant did not mention any other particular person or other persons generally. As this Court observed in Ybarra, note 2, 444 U.S. 85, 90, 62 L.Ed.2d 238, 245:

> "2. The warrant issued on March 1, 1976, did not itself authorize the search of Ybarra or of any other patron found on the premises of the Aurora Tap Tavern. It directed the police to search 'the following person or place ...the Aurora Tap Tavern...Also the person of "Greg".... 'Had the issuing judge intended that the warrant would or could authorize a search of every person found within the tavern, he would hardly have specifically authorized the search of Greg alone. Greg was an employee of the tavern, and the complaint upon which the search warrant

> was issued gave every indication that he would be present at the tavern on March 1."

Given the facts of Ybarra, it is difficult to see how that case can be described as even relevant to the issue of whether a magistrate in issuing a warrant for a place not open to the public may direct the search of the persons present. Yet the Alabama appellate courts describe Ybarra as "...the leading case on this issue...." (Brooks v. State 593 So.2d 97, 99 [Ala.Cr.App, 1991] appendix "B", page 8, quoting Helms v. State, 549 So.2d 598, 600 [Ala. Cr. Ap, 1989]; cert. den; U.S. cert. den. 493 U.S. 1022, 107 L.Ed.2d 744, 110 S.Ct. 725 [1990]). In fact, this Honorable Court has never addressed this issue.

In Ybarra, (note 4, 444 U.S. 85, 92, 662 L.Ed.2d 238, 246), this Court wrote, in pertinent part, as follows:

> "...[W]e need not consider situations where the warrant

> itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs...."

This case presents the very question which this Court did not decide in Ybarra.

The importance of this question is clear. Criminal enterprises are in operation throughout the country. Search warrants for the locations of these operations ae being executed everyday. In only the rarest of cases is it possible to identify all of the principals, associates, suppliers and customers of these clandestine activities, who will be present when warrants are executed. If magistrates cannot in appropriate cases order the search of these unidentified people, the executing officers must either eschew searching them or, more likely, find a pretext for a warrantless search of their persons. The fact that so many state

appellate courts have been called on to address this issue, as we set out in the next section, attests to the importance of this question.

This Court had no need to address this issue in Ybarra and has not done so in any subsequent case. For this reason we submit that the writ should issue to review this case.

B.

**REASON FOR GRANTING THE WRIT: CONFLICT AMONG THE STATE APPELLATE COURTS**

Prior to Ybarra a number of state appellate courts upheld warrants ordering searches of persons present, where such persons could not otherwise be identified and probable cause existed as to anyone present. State v. De Simone 60 N.J. 319, 288 A2d 849 (1972)[3]; Commonwealth v.

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3. Authorities from Florida, Georgia, Illinois, New York and Texas collected at 288 A2d 849, 854.

Smith 370 Mass. 335, 348 N.E.2d 101 (1976); cert. den. 429 U.S. 944, 50 L.Ed.2d 314, 97 S.Ct. 364. Subsequent to Ybarra, New Jersey (State v. In The Interest Of L.Q. 236 N.J. Super 464, 566 A2d 223 [1989]; cert. den. 122 N.J. 121, 584 A.2d 199) and Massachusetts (Commonwealth v. Fernandez 30 Mass. App. Ct. 335, 568 N.E. 2d 604, 607 ff [1991]), have continued to recognize the authority of magistratesto issue warrants for the search of persons present in appropriate cases. Significantly, the New Jersey Court discussed Ybarra in L.Q. (566 A2d 223, 225). In addition, since Ybarra, Colorado, (People v. Johnson) 805 P2d 1156, 1158 ff [Colo. App, 1990]; cert. den.); Florida (Terhune v. State 470 So.2d 840 [Fla. App, 2 Dist, 1985]); Minnesota (State v. Hinkel 365 N.E. 2d 774 [Minn, 1985]); Oregon (State v. Ingram 104 Or. App. 389,

802 P2d 656 [1990];[4] review granted 311 Or. 222, 810 P2d 854[5]), and Wisconsin (State v. Jeter 160 Wis. 2d 333, 466 N.W. 2d 211, 214 [Wis. App, 1991]) have approved warrants for persons present. In Johnson, (805 P2d 1156, 1158-1159), Hinkel (365 N.W. 2d 774, 776) and Jeter (466 N.W. 2d 211, 213ff) the Courts expressly rejected contrary arguments based on Ybarra.

In this case the Alabama appellate courts ruled that Ybarra established a per se rule forbidding the issuance of warrants for the search of unidentified persons who

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4. "...We do not believe that the legislature or the framers of the Constitution intended to prohibit searches of individuals for whom probable cause to search exists, but who, because of the circumstances, could not be described by name or personalized descriptions...." (802 P2d 656, 663)

5. We are advised that Ingram was argued in the Supreme Court of Oregon in January of this year and no decision is expected soon.

are present at a criminal enterprise. Obviously, such holding cannot be squared with the understanding of the Fourth Amendment and Ybarra of the appellate courts of Colorado, Florida, Massachusetts, Minnesota, New Jersey, Oregon or Wisconsin. For this reason, the writ should issue.

C.

**REASON FOR GRANTING THE WRIT: CONFLICT WITH CONSTITUTIONAL POLICY AS RECOGNIZED BY THIS HONORABLE COURT**

While this Court has never addressed the particular issue raised by this case, it has recognized and often discussed the Fourth Amendment's strong preference for searches under warrants. The rule established by the Alabama appellate courts in this case cannot be reconciled with that policy.

It would take extreme naiveté to believe that the rule adopted by the Alabama appellate courts will protect

unidentified persons, who are present at a searched criminal operation, from being searched. Situations such as that which greeted these officers at the Fish Supreme are extremely dangerous. Cocaine abuse produces highly unpredictable, often violent, behavior. Firearms are common at drug operations. The need to search both for weapons and for concealed contraband is obvious.

The Alabama appellate courts recognize that the search of persons who are present at a place for which a search warrant is issued is often necessary and appropriate. E.g. State v. Matthews __ So.2d___, 1992 W.L. 71056, (Ala. Cr. App, February 28, 1992); Stanfield v. State 529 So.2d 1053, 1056 (Ala. Cr. App, 1988); cert. den; Hastings v. State 439 So.2d 204, 205 ff (Ala. Cr. App, 1983); Travis v. State 381 So.2d 97, 101 (Ala. Cr. App, 1980); cert. den. 381 So.2d 102; Denson v.

State 375 So.2d 1275 (Ala.Cr.App, 1979); cert. den. 375 So.2d 1276.[6] Thus, it is not the law of Alabama that unidentifiable persons present at a criminal operation, which is searched under a warrant, cannot be searched, but it is the policy of the Alabama appellate courts that such persons may not be searched under a warrant. Because such persons are unidentifiable and cannot be named or described in the warrant, they are, according to the Alabama appellate courts, beyond the warrant process.

In placing unidentifiable persons who are present at a criminal operation beyond the protection of the warrant

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6 In the Courts below, the Petitioner State argued, in the alternative to the validity of the warrant, that, even if the warrant was void as to the Respondent, the search of his person was lawful under this line of authority. The State courts declined to address this argument.

process, the Alabama appellate courts ruled contrary to the policy of the Fourth Amendment, which favors searches under warrants. This policy has been recognized by this Honorable Court many times. For example, McDonald v. United States 335 U.S. 451, 455-456, 93 L.Ed. 153, 158, 69 S.Ct. 191 (1948); United States v. Ventresca 380 U.S. 102, 105-106, 13 L.Ed.2d 684, 687, 85 S.Ct. 741 (1965); Illinois v. Gates 462 U.S. 213, 236, 76 L.Ed.2d 527, 546-547, 103 S.Ct. 2317 (1983); Massachusetts v. Upton 466 U.S. 727, 733, 80 L.Ed.2d 721, 727, 104 S.Ct. 2085 (1984). There are many reasons for this preference, including, as this Court wrote in Gates, above:

> "...[T]he possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his

> power to search...." (462 U.S. 213, 236, 76 L. Ed. 2d. 527, 547)

Obviously, any state policy which places persons beyond the protection of the warrant process is in irreconcilable conflict with the Fourth Amendment. In United States v. Ventresca, above, (380 U.S. 102, 108, 13 L.Ed.2d 684, 689), and Illinois v. Gates, above, (462 U.S. 213, 236, 76 L.Ed.2d 527, 547), this Court condemned giving warrant affidavits hypertechnical readings, because such might discourage officers from resorting to the warrant process. The policy established by the Alabama appellate courts recognizes no warrant process for unidentifiable persons, who are present at places ordered searched, to which an officer may resort. Such a policy should likewise be condemned.

## CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Court of Criminal Appeals and Supreme Court of Alabama, decided an important novel question under the Fourth Amendment in a manner which conflicts sharply with the decisions of other state appellate Courts. In addition, the policies established and followed by the Alabama appellate courts are contrary to the policies established by the Fourth Amendment and recognized by this Court.

Therefore, Your Petitioner prays that this Honorable Court will issue a writ of certiorari and will review the matters complained of and reverse the decisions of

the said appellate courts of Alabama.

Respectfully submitted,

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ATTORNEY GENERAL
BY:

_____
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ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE
PETITIONER

## CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, hereby certify that on this _____ day of May, 1992, I did serve the requisite number of copies of the foregoing on the Attorney for Sylvester Brooks, Respondent, by mailing the same to said Attorney first class postage prepaid and addressed as follows:

Honorable Michael D. Cook
Attorney at Law
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_____
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